

**STATEMENT OF MICHAEL F. McENENEY
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ON BEHALF OF
THE U.S. CHAMBER OF COMMERCE**

**BEFORE THE
HOUSE COMMITTEE ON FINANCIAL SERVICES
HEARING ON H.R. 2622, THE FAIR AND ACCURATE CREDIT TRANSACTIONS
ACT OF 2003**

July 9, 2003

Good morning Mr. Chairman, Congressman Frank, and members of the Committee. My name is Michael F. McEneney and I am a partner at the law firm of Sidley Austin Brown & Wood LLP. I am pleased to have the opportunity to appear before you today on behalf of the United States Chamber of Commerce. The U.S. Chamber serves as the principal voice of the American business community here in the U.S. and around the world. Specifically, the Chamber is the world's largest business federation, representing more than three million businesses of every size, sector and region of the country.

I would like to commend you, Mr. Chairman, on the leadership you and the members of this Committee have shown with respect to protecting the security of consumers' personal information and ensuring continued access to credit at low costs. In particular, I would like to commend Chairman Bachus, Ms. Hooley, Ms. Biggert, and Mr. Moore for their leadership in crafting H.R. 2622, the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"). I believe this legislation represents much hard work and effort, and lays an important foundation for addressing identity theft and Fair Credit Reporting Act ("FCRA") issues.

The FCRA has provided a robust framework for the most advanced consumer credit and insurance markets in the world. A key component of this success is the fact that the FCRA establishes a single national system in which our credit and insurance markets can operate smoothly. This has resulted in significant consumer benefits, in the form of increased credit and insurance availability at lower costs, and has provided a source of strength for our economy. The national uniformity of key provisions in the FCRA is currently scheduled to expire on January 1, 2004. Making these provisions permanent has been a high priority for the Chamber and its member companies. We applaud the sponsors of the FACT Act for including provisions in the bill that would make the national uniform provisions established by the FCRA permanent. These provisions are critical if consumers are to continue to enjoy the benefits of the credit and insurance markets. Additionally, we believe the continuity of the national uniform standards will assist in the fight against identity theft.

The Economic Importance of National Uniformity

At the beginning of the Committee's deliberations on these issues, there were a number of questions raised about the significance of the national uniformity established by the FCRA. A recent study that goes a long way to answering those questions is, "The Fair Credit Reporting Act: Access, Efficiency & Opportunity." The study was prepared by the Information Policy Institute ("IPI") with the support of the National Chamber Foundation of the U.S. Chamber of Commerce. The aim of the study was to examine specifically whether a loss of the existing framework of preemption would threaten the benefits of our current credit markets currently enjoyed by consumers. This study relied on hard data to determine the impact on consumers and industry if the national uniform standards were lost. I would like to share some of the study's findings with the Committee.

In General

In all areas of inquiry, the IPI found that the national uniform standards established by the FCRA have contributed significantly to the consumer benefits of the current credit marketplace. Further, the IPI found few quantifiable direct or indirect costs to consumers associated with the national uniform standards. The study concluded that the loss of the existing framework of preemptions would threaten the current consumer benefits, and that Congressional action is necessary to ensure the continuity of our national standards.

Mortgages

The study recognizes that many of the efficiencies developed by the mortgage underwriting market, such as automated underwriting, are made possible, at least in part, by the national uniformity established by the FCRA. According to the study, automated underwriting consistently does a better job of identifying loans that ultimately "perform"—loans that do not experience a serious delinquency or default. Moreover, automated underwriting allows mortgage underwriters to accommodate high volumes of activity. For example, in 2002, the Federal Reserve estimates that homeowners were able to gain access to approximately \$700 billion of equity in their homes—an astounding figure that may not have been possible under a less efficient system. The introduction of mortgage underwriting efficiencies, which have resulted in part from the national uniformity established by the FCRA, also appear to have significantly reduced the costs of closing a loan, saving consumers at least \$18.75 billion in 2002.

Credit Availability

The study also examined four different scenarios under which the FCRA's national uniformity was allowed to expire and the FCRA's operative provisions were modified in ways suggested by existing legislative proposals in various states. The study examined the impact of these changes on six different commercial credit scoring models in order to approximate the impact on consumers and the cost of credit. In all four scenarios, the study found that loan approval rates would decrease or delinquencies would increase, resulting in increased costs to consumers. Furthermore, the predictive power of credit report information would decline, damaging creditors' ability to evaluate credit risk. If creditors cannot properly evaluate credit

risk, one of two things generally occurs in order to hedge against that increased risk—creditors make less credit available, or they increase the cost of credit. Either way, consumers lose if the FCRA’s national uniform standards expire.

Prescreening

The study evaluated the current practice of “prescreening” customers for preapproved offers of credit. According to the study, increased competition which has been driven in part by prescreening has caused interest rates to be lower overall than they were in 1990. The study also found that prescreening was the most important method of acquiring new credit card customers, and that restrictions on prescreening would increase costs to consumers, and decrease consumers’ access to unsecured credit.

The Importance of National Uniformity to the Security of Consumers’ Personal Information

As I mentioned above, the Chamber shares the Committee’s goals in providing for continued access to credit as well as protecting the security of consumers’ personal information. The national standards established by the FCRA are an important component of protecting the security of consumers’ personal information. For example, the national uniform provisions under the FCRA ensure that financial institutions can have access to reliable credit report information for a variety of purposes, including identity theft prevention. Indeed, the important role credit reports can play in the efforts of financial institutions to verify the identity of their customers has been recognized as part of the regulatory efforts to implement the customer identification provisions of the USA PATRIOT Act.

The national uniform standards also allow companies to prevent identity theft in more subtle ways. Under the FCRA, companies have a single federal standard governing their ability to share information among affiliated entities. A key purpose for the sharing of information among affiliates is to prevent fraud, including identity theft. The FCRA also establishes a uniform standard for prescreening consumers for credit. It is noteworthy that the fraud rates, including identity theft, are significantly lower on accounts acquired through prescreening than accounts acquired through other means. Providing states the opportunity to enact their own prescreening rules would make this more secure method of customer acquisition less attractive if not impossible.

The national standards established by the FCRA also ensure that consumers have the tools necessary to protect themselves against identity theft. For example, consumers are provided a standardized notice if they are the subject of adverse action based on a consumer report. This notice, which is standard across the country, informs the consumer of the adverse action and notifies the consumer that the action was based, at least in part, on information from a credit report. This is a “red flag” to the consumer to check the credit report to ensure its accuracy. Furthermore, the FCRA establishes a single timeframe under which credit bureaus have to reinvestigate any consumer disputes. I think we can all agree that it is challenging enough for credit bureaus and consumers to resolve identity theft issues under a single set of rules—imagine the difficulty if credit bureaus had to comply with different rules depending on where the consumer resides.

Additional Measures in the FACT Act

Fighting Identity Theft

Although renewal of the FCRA's national uniform standards is a critical component of the Committee's and the Chamber's desire to fight identity theft, we agree with the Committee that more can be done. The Chamber commends Chairman Bachus and the cosponsors of H.R. 2622 for taking steps to protect consumers against identity theft. The FACT Act includes provisions to address a number of potential scenarios involving identity theft. For example, the FACT Act establishes specific obligations relating to certain address change requests and to fraud alerts. The Chamber strongly supports efforts to address these important issues and appreciates the opportunity to provide its comments on the legislation.

In general, we believe that there is a common theme that should guide the Committee in its consideration of provisions to combat identity theft. More specifically, the Chamber believes that the methods used to address potential identity theft scenarios should be flexible, allowing companies to utilize the means most efficient to them to thwart identity thieves. We believe that this goal is embodied in several provisions of the FACT Act. For example, the legislation includes a provision requiring the federal banking agencies to develop "red flags" for financial institutions to use in detecting identity theft. This provision relies inherently on the recognition that a "one size fits all" approach may not work—the "red flags" presented by identity thieves will invariably change over time and the tools used to combat the thieves should change as well.

The Chamber is concerned that if the methods for preventing identity theft are "written in stone," companies will be forced to devote resources to complying with these methods, regardless of whether they become outdated or if more efficient alternatives become available. Furthermore, if companies must adhere to specific statutory requirements with respect to identity theft, it may become difficult for companies to alter their procedures in light of the constantly evolving nature of identity theft. The FACT Act takes important steps in the direction of providing this flexibility, and we hope this is a theme that can be further explored.

Access to Credit Reports

The FACT Act also addresses the important issue of a consumer's ability to access his or her credit report. It is important for a consumer to have access to his or her credit report in order to ensure the report's accuracy, as well as to address any instance of identity theft as soon as possible. The FCRA currently ensures that access to credit reports is relatively inexpensive—the cost is capped by law at \$9. In addition, the Chamber strongly supports the provisions in current law that provide consumers with access to their credit report at no charge in certain situations. For example, a consumer can obtain his or her credit report for free if the consumer: (i) has been the subject of "adverse action" (e.g. denial of credit) due in part to information in a credit report; (ii) is unemployed and intends to apply for employment; (iii) is a recipient of public welfare assistance; or (iv) has reason to believe that the file on the consumer at the credit bureau contains inaccurate information due to fraud, including identity theft.

The FACT Act would allow consumers to access their credit reports at each credit bureau at no charge once a year. The Chamber welcomes the consideration of how to make credit

reports more available to consumers. We believe, however, that this issue merits careful study before next steps are taken. In particular, there should be a careful examination of the costs associated with a “free” credit report in order to ensure that there are no unintended consequences. For example, the costs of providing free reports and the related customer service will have to be absorbed by the consumer. Moreover, resources that are currently dedicated to investigating potential errors in consumer reports, or assisting consumers with resolving identity theft claims, will need to be redirected to meet the demand for “free” credit reports. It should also be noted that a single, well placed national news article or widely circulated e-mail could create significant spikes in demand for credit reports that simply could not be met without severe disruption to the other important customer service functions performed by credit bureaus.

Fighting Workplace Violence and Sexual/Racial Harassment

The Chamber is pleased that the FACT Act includes a provision that would make it clear that companies can conduct investigations of wrongdoing in the workplace without the inappropriate application of the FCRA. Currently, the broad definitions of “consumer report” and “consumer reporting agency,” as interpreted by the Federal Trade Commission (“FTC”), appear to apply if an employer uses outside experts to investigate employee misconduct. This results in the outside firm, such as an accounting firm or law firm, potentially becoming a consumer reporting agency for purposes of the FCRA. Because of the difficulties in conducting an investigation while complying with the FCRA’s requirements, and because employers and investigators face significant potential liability, including punitive damages, for failure to comply with the FCRA’s requirements, the FTC’s interpretation deters employers from using experienced and objective outside organizations to investigate workplace misconduct. While the FTC’s interpretation affects all businesses, it is particularly damaging to small and medium businesses that do not have in-house resources to conduct their own investigations.

The FACT Act remedies this problem. The FACT Act would exclude employment investigations that are not for the purpose of investigating the employees’ creditworthiness from the FCRA requirements. I want to stress that this provision is a narrow correction of an obvious problem created by current interpretation of the law. In addition, the legislation does not leave those suspected of misconduct without protection—it still requires that employers who take adverse action against an employee based on information from an investigation provide the employee with a summary of the nature and substance of the report. We applaud the work of Congressman Pete Sessions on these provisions, and support their inclusion in the FACT Act.

Conclusion

Once again, I would like to thank the Committee for its diligent efforts in examining ways to maintain the consumer benefits of our current financial marketplace while also protecting the security of consumers’ personal information. The Chamber believes that the FACT Act represents a foundation for achieving these two critical goals. The legislation includes important provisions pertaining to the national uniformity established by the FCRA. H.R. 2622 also includes many important initiatives in the fight against identity theft. The Chamber also believes that the bill appropriately addresses the workplace investigation problems under the current law. The Chamber looks forward to working with you, Mr. Chairman, and with other members of the Committee as the legislation moves forward.

Thank you again for the opportunity to appear before you today. I would be happy to answer any questions you may have.